

HAROLD L. PASSMORE,  
Plaintiff,  
  
v.  
  
MICHAEL J. ASTRUE, Commissioner  
of Social Security,  
  
Defendant.

)  
) No. CV-11-0039-CI  
)  
) ORDER GRANTING PLAINTIFF'S  
) MOTION FOR SUMMARY JUDGMENT  
) AND ORDERING REMAND  
)  
)  
)  
)  
)

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 20, 26.) Attorney Rebecca M. Coufal represents Natalie I. Spoelstra (Plaintiff); Special Assistant United States Attorney Robert L. Van Saggi represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

On October 5, 2007, Plaintiff protectively filed a Title II application for disability and disability insurance benefits. On that same date, Plaintiff also filed a Title XVI application for supplemental security income, and in both applications Plaintiff alleged disability beginning June 14, 2007. (Tr. 14; 122.) He alleged disability due to Bells Palsy, heart problems, arthritis,

1 chronic pain and a broken neck. (Tr. 127.) Plaintiff's claim was  
2 denied initially and on reconsideration, and he requested a hearing  
3 before an administrative law judge (ALJ). (Tr. 66-101.) A hearing  
4 was held on June 23, 2009, at which Stephen Gerber, M.D., Vocational  
5 Expert Diane Kramer, and Plaintiff, who was represented by counsel,  
6 testified. (Tr. 28-60.) ALJ Robert S. Chester presided. (Tr. 28.)  
7 The ALJ denied benefits on July 24, 2009. (Tr. 14-23.) The instant  
8 matter is before this court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript  
11 of proceedings and are briefly summarized here. At the time of the  
12 hearing, Plaintiff was 53 years old and living with his wife. (Tr.  
13 37.) He had two grown children. (Tr. 37.) Plaintiff obtained a  
14 high school diploma. (Tr. 38.) His last job involved using a  
15 handheld high-speed grinder at a stainless steel company. (Tr. 38.)  
16 Plaintiff has also worked as a food press operator, dishwasher, car  
17 washer, lumber handler, seafood processor, and floor waxer. (Tr.  
18 39-41.) Plaintiff testified that he quit working because his hands,  
19 shoulders, hip and lower back could no longer take the rigors of  
20 work. (Tr. 41.)

21 In 1998, Plaintiff fell off a porch and broke his neck in two  
22 places. (Tr. 41.) He testified that he had back surgery, but he  
23 continued to experience problems due to nerve damage. (Tr. 41-42.)  
24 He said he has numbness in his fingertips, and that they lock up and  
25 are painful. (Tr. 43.) Plaintiff also testified that his hips hurt  
26 and he cannot walk more than two blocks at a time. (Tr. 44.)  
27 Plaintiff said he has heart problems, and in 2008, he underwent a  
28 triple bypass surgery. (Tr. 44.) Plaintiff testified that he can

1 stand for about an hour and sit for only up to one hour at a time  
2 before his hips and lower neck start cramping. (Tr. 45.) Plaintiff  
3 also testified that his shoulder hurts if he does too much lifting.  
4 (Tr. 46.) He said he has asthma, and he uses a nebulizer once per  
5 day. (Tr. 47.) He smokes four cigarettes per day, but said he  
6 wants to quit. (Tr. 47.) Plaintiff also said he does not sleep  
7 well, and wakes up several times per night. (Tr. 48.)

8 Plaintiff spends his days sitting on his porch, watching  
9 television, and he helps with dinner. (Tr. 49.) Plaintiff has been  
10 blind in one eye since he was a child. (Tr. 49.) Plaintiff  
11 testified that his medication for anxiety helped, but he still feels  
12 "anxious, withdrawn, nervous," and if he does not take his  
13 medication, and he gets angry for no reason. (Tr. 50.)

#### 14 ADMINISTRATIVE DECISION

15 At step one, ALJ Chester found Plaintiff had not engaged in  
16 substantial gainful activity since June 14, 2007, the onset date.  
17 (Tr. 16.) At step two, he found Plaintiff had the following severe  
18 impairments: status post cervical spine fusion, osteoarthritis of  
19 the bilateral hands, coronary artery disease, and left eye  
20 prosthesis. (Tr. 16.) At step three, the ALJ determined  
21 Plaintiff's impairments, alone and in combination, did not meet or  
22 medically equal one of the listed impairments in 20 C.F.R., Subpart  
23 P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925 and 416.926). (Tr.  
24 19.) In step four findings, the ALJ found Plaintiff's statements  
25 regarding pain and limitations were not credible to the extent they  
26 were inconsistent with the RFC findings. (Tr. 21.) He found that  
27 Plaintiff retained the RFC to perform medium work with the following  
28 limitations:

1 [L]ifting and carrying restricted to 20 pounds frequently  
2 and 40 pounds occasionally. He is limited to occasional  
3 handling and fingering. Depth perception and field of  
4 vision are limited due to monocular vision. He should  
5 avoid concentrated exposure to fumes, odors, gases and  
6 poor ventilation. He should avoid concentrated exposure  
to hazards such as machinery and heights. He can  
occasionally climb ramps or stairs but should avoid  
climbing ladders, ropes or scaffolds. He can occasionally  
engage in balancing, stooping, kneeling, crouching or  
crawling.

7 (Tr. 20.)

8 ALJ Chester found that jobs exist in significant numbers in the  
9 national economy that Plaintiff can perform, such as cashier II,  
10 outside deliverer, or survey worker. (Tr. 23.) Subsequent to the  
11 ALJ's decision, Plaintiff submitted a medical evaluation completed  
12 prior to the administrative hearing in which his treating physician,  
13 Gabriel Charbonneau, M.D., opined Plaintiff was disabled. (Tr. 347-  
14 49.) The Appeals Council found that the physical limitations  
15 assessed by Dr. Charbonneau were not supported by his treatment  
16 records, or any other evidence in the record and, therefore, the  
17 evaluation does not provide a basis for changing the ALJ's decision.  
18 (Tr. 2.)

#### 19 STANDARD OF REVIEW

20 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
21 court set out the standard of review:

22 A district court's order upholding the Commissioner's  
23 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
24 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
Commissioner may be reversed only if it is not supported  
25 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
26 Substantial evidence is defined as being more than a mere  
scintilla, but less than a preponderance. *Id.* at 1098.  
27 Put another way, substantial evidence is such relevant  
evidence as a reasonable mind might accept as adequate to  
support a conclusion. *Richardson v. Perales*, 402 U.S.  
28 389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner.  
2 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
*Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

3 The ALJ is responsible for determining credibility,  
4 resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
5 Cir. 1995). The ALJ's determinations of law are reviewed  
6 *de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

7 It is the role of the trier of fact, not this court, to resolve  
8 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
9 supports more than one rational interpretation, the court may not  
10 substitute its judgment for that of the Commissioner. *Tackett*, 180  
11 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
12 Nevertheless, a decision supported by substantial evidence will  
13 still be set aside if the proper legal standards were not applied in  
14 weighing the evidence and making the decision. *Browner v. Secretary*  
15 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
16 substantial evidence exists to support the administrative findings,  
17 or if conflicting evidence exists that will support a finding of  
18 either disability or non-disability, the Commissioner's  
19 determination is deemed conclusive. *Sprague v. Bowen*, 812 F.2d  
20 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 21 SEQUENTIAL PROCESS

22 The Commissioner has established a five-step sequential  
23 evaluation process for determining whether a person is disabled. 20  
24 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
25 137, 140-42 (1987). In steps one through four, the burden of proof  
26 rests upon the claimant to establish a prima facie case of  
27 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.  
28 This burden is met once a claimant establishes that a physical or

1 mental impairment prevents him from engaging in his previous  
 2 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a  
 3 claimant cannot do his past relevant work, the ALJ proceeds to step  
 4 five, and the burden shifts to the Commissioner to show that (1) the  
 5 claimant can make an adjustment to other work; and (2) specific jobs  
 6 exist in the national economy which claimant can perform. *Batson v.*  
 7 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).  
 8 If a claimant cannot make an adjustment to other work in the  
 9 national economy, a finding of "disabled" is made. 20 C.F.R. §§  
 10 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

#### 11 ISSUES

12 The Plaintiff contends<sup>1</sup> the ALJ erred by failing to find he  
 13

---

14 <sup>1</sup>As a preliminary matter, the court notes in Plaintiff's  
 15 Memorandum of Authorities, Plaintiff fails to provide an issues list  
 16 or provide any designation identifying which portions of his  
 17 argument relate to which issue. To avoid inadvertently waiving an  
 18 issue, every effort to comply with FED. R. APP. P. 28(a) governing  
 19 briefs should be made, which requires an opening brief contain:

20 (5) a statement of the issues presented for review;

21 . . .

22 (7) a statement of facts relevant to the issues submitted  
 23 for review with appropriate references to the record (see  
 Rule 28(e));

24 (8) a summary of the argument, which must contain a  
 25 succinct, clear, and accurate statement of the arguments  
 26 made in the body of the brief, and which must not merely  
 repeat the argument headings;

27 (9) the argument, which must contain:

28 (A) appellant's contentions and the reasons for  
 them, with citations to the authorities and parts of

1 had a mental impairment, by rejecting Dr. Pollack's assessment and  
2 the Appeals Council erred by affirming Plaintiff's RFC. (ECF No.  
3 21 at 9; 14.) Defendant contends the ALJ's decision is supported  
4 by substantial evidence and free of legal error. (ECF No. 27.)

#### 5 DISCUSSION

##### 6 A. Step Two Severe Mental Impairment.

7 Plaintiff contends that the ALJ erred by failing to find that  
8 he suffered from a severe mental impairment. (ECF No. 21 at 13.)  
9 The ALJ concluded that Plaintiff's anxiety imposed no more than a *de*  
10 *minimus* limitation upon his ability to do work-related activities  
11 and therefore was not a severe impairment. (Tr. 19.) The ALJ's  
12 analysis related to Plaintiff's mental impairment claim was in part:

13 After careful review of the record, the undersigned  
14 finds that the claimant's anxiety and reported diagnosis  
15 of chronic obstructive pulmonary disease is imposing no  
16 more than a minimal or *de minimus* limitation upon his  
17 ability to do work-related activities, and therefore, is  
18 not a severe impairment. He is currently prescribed  
19 medication for anxiety, however, he has discontinued this  
20 in the past, has had no counseling or other psychological  
21 or psychiatric treatment, and his treating physician does  
22 not indicate significant symptoms or limitations as a  
23 result.

19 (Tr. 19.) The ALJ also concluded that the assessment by Dr. Pollack  
20 indicating Plaintiff had a mental impairment deserved no weight.  
21 (Tr. 19.)

22 In step two of the disability determination, an ALJ must  
23

---

24 the record on which the appellant relies.

25 FED. R. APP. P. 28(a)(5)-(9); see also *Rattlesnake Coalition v.*  
26 *United States EPA*, 509 F.3d 1095 (9th Cir. 2007)(issues raised in  
27 opening brief but not supported by argument are considered  
28 abandoned).

1 determine whether the claimant has a medically severe impairment or  
2 combination of impairments. In making this determination, an ALJ is  
3 bound by 20 C.F.R. § 404.1520a. That regulation requires those  
4 reviewing an application for a mental disability claim follow a  
5 special psychiatric review technique. 20 C.F.R. § 404.1520a.  
6 Specifically, the reviewer must determine whether an applicant has  
7 a medically determinable mental impairment,<sup>2</sup> rate the degree of  
8 functional limitation for four functional areas,<sup>3</sup> determine the  
9 severity of the mental impairment (in part based on the degree of  
10 functional limitation),<sup>4</sup> and if the impairment is severe, proceed to  
11 step three of the disability analysis to determine if the impairment  
12 meets or equals a specific listed mental disorder.<sup>5</sup>

13 At the first two levels of review, this technique is documented  
14 in a Psychiatric Review Technique Form ("PRTF"). 20 C.F.R. §  
15 404.1520a(e). At hearings before an ALJ or the Appeals Council,  
16 however, the Commissioner must "document application of the  
17 technique in the decision." *Id.* Specifically, the ALJ's "written  
18 decision must incorporate the pertinent findings and conclusions  
19 based on the technique" and "must include a specific finding as to  
20 the degree of limitation in each of the functional areas." *Id.* §  
21 404.1520a(e)(4).

22 In this case, the record reflects that in September, 2008,  
23 Plaintiff returned to the Spokane Falls Family Clinic, after re-  
24

---

25 <sup>2</sup>20 C.F.R. § 404.1520a(b).

26 <sup>3</sup>20 C.F.R. § 404.1520a(c).

27 <sup>4</sup>20 C.F.R. § 404.1520a(c)(1).

28 <sup>5</sup>20 C.F.R. § 404.1520a(c)(2).



1 establishing medical insurance, and he reported that he was  
2 suffering from anxiety. (Tr. 318.) Gabriel Charbonneau, M.D.,  
3 examined Plaintiff and prescribed Celexa, an antidepressant. (Tr.  
4 319.) In October, 2008, Plaintiff reported the Celexa increased his  
5 anger and anxiety, so he quit taking it. (Tr. 320; 322.) Dr.  
6 Charbonneau changed the prescription to Zoloft. (Tr. 320.) In  
7 November, 2008, Plaintiff reported that the Zoloft had significantly  
8 decreased his anxiety. (Tr. 322.) The record also reveals Dennis  
9 R. Pollack, Ph.D., examined Plaintiff on June 8, 2009. (Tr. 331-  
10 40.) Dr. Pollack administered several objective tests and his  
11 diagnosis included Pain Disorder associated with both psychological  
12 factors and general medical condition, and depression. (Tr. 334-  
13 36.) Dr. Pollack completed a Mental Medical Source Statement that  
14 indicated Plaintiff was markedly limited in the ability to (a)  
15 perform activities within a schedule, maintain regular attendance  
16 and be punctual within customary tolerance; (b) complete a normal  
17 workday and workweek without interruptions from psychologically  
18 based symptoms; and (c) perform at a consistent pace without an  
19 unreasonable number and length of rest periods. (Tr. 338.) Between  
20 the treating and examining medical records, Plaintiff has  
21 established a colorable claim of a mental impairment.<sup>6</sup>

22  
23 <sup>6</sup>Additionally, Plaintiff submitted to the Appeals Council a  
24 check-the-box form completed on December 8, 2008, by his treating  
25 physician. (Tr. 347-49.) On that form, Dr. Charbonneau opined that  
26 Plaintiff had anxiety with a severity level between moderate and  
27 marked. (Tr. 348.) While the ALJ did not review this evaluation,  
28 it further provides support for Plaintiff's colorable claim of a

1 The ALJ's written decision did not document the ALJ's  
2 application of the "special technique" for mental impairments and  
3 did not include a specific finding as to the degree of limitation in  
4 any of the four functional areas. In *Keyser v. Comm'r Soc. Sec.*  
5 *Admin.*, 648 F.3d 721, 725 (9th Cir. 2011), the ALJ did not state his  
6 findings as to the four functional areas as required by the plain  
7 language of 20 C.F.R. § 404.1520a(e), and the court reversed and  
8 remanded for application of the mental impairment analysis. The  
9 *Keyser* court noted that where the claimant has presented a colorable  
10 claim of a mental impairment, failure to apply the special technique  
11 is not harmless error. *Keyser*, 648 F.3d at 726. This case is  
12 similar to *Keyser*. Here, the ALJ failed to document his application  
13 of the psychiatric review technique and specific findings as to the  
14 degree of limitation in each functional area. As a result, the  
15 ALJ's treatment of Plaintiff's mental impairment claim in this case  
16 is insufficient to meet the requirements of 20 C.F.R. § 404.1520a(e)  
17 and, therefore, constitutes legal error. Remand for a proper  
18 analysis of Plaintiff's mental impairment is required.

19 **B. Remand.**

20 On remand, the ALJ should document his application of the  
21 "special technique" for evaluating the severity of mental  
22 impairments, as required by 20 C.F.R. § 404.1520a. Until the ALJ  
23 has properly evaluated the medical evidence in this case, including  
24 the evidence regarding plaintiff's alleged mental impairments, the  
25 court cannot evaluate the adequacy of the ALJ's RFC assessment. See  
26 SSR 96-8p at 1 ("RFC is an assessment of an individual's ability to  
27 \_\_\_\_\_  
28 mental impairment.

1 do sustained work-related physical and mental activities in a work  
2 setting on a regular and continuing basis. A 'regular and continuing  
3 basis' means 8 hours a day, for 5 days a week, or an equivalent work  
4 schedule."). Thus, on remand, the ALJ shall also reassess  
5 Plaintiff's RFC.

6 **CONCLUSION**

7 **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment (**ECF No. 20**) is  
9 **GRANTED** and the matter is **REMANDED** to the Commissioner for  
10 additional proceedings.

11 2. Defendant's Motion for Summary Judgment (**ECF No. 26**) is  
12 **DENIED;**

13 3. An application for attorney fees may be filed by separate  
14 motion.

15 The District Court Executive is directed to file this Order and  
16 provide a copy to counsel for Plaintiff and Defendant. Judgment  
17 shall be entered for Plaintiff, and the file shall be **CLOSED**.

18 DATED October 15, 2012.

19  
20 S/ CYNTHIA IMBROGNO  
21 UNITED STATES MAGISTRATE JUDGE  
22  
23  
24  
25  
26  
27  
28